IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2005 Session

STATE OF TENNESSEE v. RUBY BREEDEN, BILLY NICELY, and MARSHA SUTTON

Appeal from the Criminal Court for Union County
No. 2387 A B C Shayne E. Sexton, Judge

No. E2004-01512-CCA-R3-CD - Filed November 30, 2005

The Appellants, Ruby Breeden, Billy Nicely, and Marsha Sutton, were indicted by a Union County grand jury for conspiracy to commit the first degree murder of Michael Hood. In a second count of the indictment, the Appellants, Nicely and Sutton, were charged with the attempted first degree murder of Hood. At the close of the proof, the trial court granted a judgment of acquittal with regard to the conspiracy charge against Sutton. The jury returned guilty verdicts in the conspiracy count against Breeden and Nicely. Under count two, the jury also found Nicely guilty of attempted first degree murder as charged and found Sutton guilty of facilitating attempted first degree murder. Because our criminal code provides that a defendant may not be convicted of both the inchoate offenses of conspiracy and criminal attempt where the charged conduct is designed to culminate in the commission of the same offense, the trial court entered a "not guilty" verdict with regard to Nicely's conviction for attempted first degree murder. *See* Tenn. Code Ann. § 39-12-106(a) (2003). On appeal, Breeden has raised six issues for our review: (1) whether the trial court abdicated its duty, as required by Tenn. R. Crim. P. 33(f), to act as the thirteenth juror; (2) whether the evidence was sufficient to support her conspiracy conviction; (3) whether the trial court erred in denying her motion to sever due to *Bruton* violations; (4) whether the court committed reversible error by failing to provide an adequate limiting instruction to the jury regarding the use of co-conspirators' statements; (5) whether the court erred in allowing the State to deviate from the bill of particulars; and (6) whether the trial court erred in refusing to instruct the jury regarding the overt act relied upon by the State to establish the conspiracy charge. Nicely has raised five issues for our review: (1) whether the court erred in performing its role as the thirteenth juror; (2) whether the evidence is sufficient to support his conspiracy conviction; (3) whether the State committed prosecutorial misconduct during the presentation of a State's witness; (4) whether the court erred in denying his motion to sever the offenses by allowing the jury to adjudicate his guilt on two inchoate offenses in view of Tennessee Code Annotated section 39-12-106(a); and (5) whether the court erred in refusing to instruct the jury regarding the overt act relied upon by the State to establish the conspiracy charge. Sutton specifically raised four issues for our review: (1) whether the court erred in denying her motion to sever; (2) whether the court erred by failing to strike and order the jury not to consider statements made by the co-defendants against Sutton; (3) whether the evidence is sufficient to support her facilitation conviction; and (4) whether the court erred in failing to instruct the jury as to the offense of accessory after the fact. Additionally, Sutton was granted permission to "adopt and

join" all relevant portions of her co-appellants' briefs. Following review of the record, we conclude that the evidence is insufficient to support Sutton's conviction for facilitation of attempted first degree murder. Accordingly, her conviction is reversed and the case dismissed. With regard to Breeden and Nicely, we conclude that the trial court erred by failing to act as the thirteenth juror and by admitting hearsay statements of Nicely against Breeden that were not made in furtherance of the conspiracy. While we find no merit to the remaining arguments, our findings of reversible errors entitle both Breeden and Nicely to a new trial on the charge of conspiracy to commit first degree murder. Accordingly, their convictions are reversed, and the case is remanded for a new trial.

Tenn. R. App. P. 3; Judgment of the Criminal Court Reversed and Dismissed as to the Appellant Sutton; Reversed and Remanded as to the Appellants Breeden and Nicely

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

John E. Eldridge and Robert R. Kurtz, Knoxville, Tennessee, for the Appellant, Ruby Breeden.

Wesley D. Stone, Tazewell, Tennessee, for the Appellant, Billy Nicely.

Byron D. Bryant, Knoxville, Tennessee, for the Appellant, Marsha Sutton.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William Paul Phillips, District Attorney General; John W. Galloway, Jr., Deputy District Attorney General; Lori Phillips Jones and Amanda Cox, Assistant District Attorneys General; for the Appellee, State of Tennessee.

OPINION

Factual Background

On September 7, 2002, the victim, Michael Hood, his girlfriend, Donna Brown, and her three sons resided at 107 Megan Lane in Union County. Hood's next door neighbors were Lee Kennedy, Kennedy's girlfriend, Ruby Breeden, and Ms. Breeden's four-year-old son. The relationship between the two households was amicable until an older boy began associating with Ms. Brown's teenage sons. Kennedy perceived the older boy as trouble for the neighborhood; Hood characterized Kennedy as a person who drank all the time. After Kennedy's property was vandalized, he blamed the Brown boys and their friend. Problems between the two families continued to escalate.

On the evening of September 6, 2002, Lee Kennedy was seen on Hood's back porch cutting the TV cable and phone lines to the house. Hood called the police and filed an incident report. The following day, Hood, while at his sister's residence, received a call from Donna Brown that Kennedy was armed with a handgun and threatening her children. Hood returned home, and he called the Sheriff's Department. Deputy Wayne Cole of the Union County Sheriff's Department responded

to the scene and spoke with Hood and Brown. He subsequently went to the Kennedy/Breeden household, where he stayed twenty to thirty minutes, before arresting Kennedy. After Kennedy was arrested, Cole informed Hood and Brown to call if they had any more problems because Breeden was still "mouthing" about Kennedy's arrest. The dispatch log indicates that Cole left the scene to transport Kennedy to jail at 9:48 p.m. Approximately ten to fifteen minutes later, Brown saw Breeden leave her home in her Chevrolet Blazer.

Shortly thereafter, Breeden arrived at the Whipping Post Bar in Union County. Nicely, a co-owner of the bar, and his girlfriend, Sutton, were at the bar when Breeden arrived. Approximately ten to twelve patrons were also present. Almost immediately after her arrival, Breeden stated to Nicely that "she'd had trouble with her neighbors and she's over the motherfucker and she want[ed] them shot, she want[ed] them dead." Nicely was heard to respond, "It shall be done." According to Josh Chandler, a bar patron, who was standing nearby, Breeden delivered to Nicely a sum of money, which he believed to be $200, to kill Hood, with a promise that her Chevrolet Blazer and an additional sum of money would be paid "after it was done." Chandler stated that Nicely asked him to drive to Hood's residence, but Chandler refused. Nicely and Sutton were seen leaving the bar, with Nicely driving Sutton's vehicle. Chandler testified that Nicely told him he had an SKS rifle in the back of Sutton's blue hatchback.

Charly Reavis testified that on the night in question, she was working as a waitress at the Whipping Post Bar. She stated that she had arrived at the bar earlier that afternoon, along with Josh Chandler. Reavis related that she overheard the conversation between Nicely and Breeden and Nicely's agreement that he would shoot Hood. According to Reavis, the conversation occurred on the parking lot of the bar and not inside. Reavis acknowledged that, at the time, she had consumed a twelve-pack of beer but testified that she "wasn't that drunk." Reavis stated she saw Breeden give Nicely $160 and the keys to her Blazer as payment to shoot Hood. According to Reavis, Nicely entered the bar and returned shortly thereafter with an SKS rifle, which he placed in Sutton's car. The two then left, with Sutton driving.

Approximately one hour after Kennedy was arrested, Brown and her son Joey were in the bedroom playing video games and watching television. Brown saw the headlights of a car shining through her window. The small light blue car slowed and stopped by the mailboxes. Neither Brown nor Joey was able to identify any person in the car. The front door to the home was open, which permitted Hood to be seen in the kitchen from the outside. Immediately thereafter, gunshots were heard, and Hood yelled that he had been shot. The bullet went through the wall, struck Hood, and lodged in a ketchup bottle located on the counter behind him. Hood was subsequently transported by Life Star to the University of Tennessee Hospital where he remained hospitalized for six days.

Chandler testified that Nicely and Sutton were gone from the bar approximately an hour to an hour and a half and returned in a small brown Toyota with a man and a woman that he did not know. Chandler related that when Nicely returned to the bar, he was "happy, jumping up and down, and hollering, saying, the motherfucker's dead . . . [that] he liked it, it was a rush." Chandler stated that he, Reavis, and Breeden left the bar around 1:00 a.m. Chandler also stated that three or four

days later, Nicely offered to sell him Ms. Breeden's 2000 Chevrolet Blazer for $800, noting that the VIN would need to be changed. Chandler declined the offer.

Reavis stated that Nicely and Sutton returned to the bar approximately thirty to forty-five minutes later. Upon Nicely's return, "he was all hopped up like he had an adrenaline rush," and he said he had shot and killed a man. She also observed Breeden give Nicely an additional $150.

Darrell Tapp testified that he lived next door to Nicely and Sutton and had purchased a brown Toyota several months earlier from Sutton. He stated that Nicely and Sutton appeared at his house on the night of September 7th and asked for a ride to the Whipping Post Bar. According to Tapp, Nicely told him he had shot a man out the window of the car. Sutton stated she was driving the car when the event occurred. Additionally, Tapp was told that the two needed to park Sutton's car, as there were only two like it in the entire county. Tapp also observed Nicely with a "wad" of cash. Tapp stated he did not contact law enforcement at the time because he did not believe Nicely.

On January 27, 2003, a Union County grand jury returned a two-count indictment against the Appellants. Count 1 charged all three Appellants with conspiracy to commit first degree murder. Count 2 charged Nicely and Sutton with attempted first degree murder. Motions to sever were filed in the case but were denied by the trial court. The case proceeded to trial on June 3, 2003. After the close of the State's proof, Sutton moved for judgment of acquittal with regard to her charge of conspiracy. The motion was granted by the trial court. Following deliberations, the jury found Breeden and Nicely guilty of conspiracy to commit first degree murder. Nicely was also found guilty of attempted first degree murder. The jury found Sutton guilty of the lesser included offense of facilitating attempted first degree murder. Pursuant to an agreement with the State, Breeden was sentenced to seventeen and one-half years as a Range I standard offender. Sutton was sentenced pursuant to an agreement to an eight-year sentence of split confinement with one year to be served in the county jail. Regarding Nicely, the trial court set aside the jury's verdict of attempted first degree murder and entered a not guilty verdict. Nicely was sentenced to a term of twenty years for the conspiracy conviction. Each Appellant filed a motion for new trial. After a lengthy hearing on the issues, the trial court denied all motions. This timely appeal followed.

Analysis

I. Appellant Sutton

Appellant Sutton has challenged, among other issues, the sufficiency of the evidence supporting her conviction for the lesser included offense of facilitating attempted first degree murder. She specifically argues that the evidence is insufficient because no evidence was presented that she "knew that another person intended to commit the specific felony of Attempted First-Degree Murder." In considering this issue, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.

Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

"A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Although a conviction may be based entirely upon circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1974), in such cases, the facts must be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991) (citing *State v. Duncan*, 698 S.W.2d 63 (Tenn. 1985)). However, as in the case of direct evidence, the weight to be given circumstantial evidence and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958) (citations omitted).

"A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a) (2003). Thus, in this case, the State was required to prove beyond a reasonable doubt: (1) that Sutton knew that Nicely intended to commit the first degree premeditated murder of Hood and (2) that she furnished substantial assistance to Hood in the commission of the offense.

The State's entire argument with regard to Sutton's sufficiency argument is as follows:

> [T]he evidence submitted in this case certainly establishes that Ms. Sutton went with Mr. Nicely and drove to the victim's home, and she then went with Mr. Nicely to the home of her friend Darrell Tapp in order to procure a ride back to the bar. The evidence here is sufficient to establish Ms. Sutton's facilitation to commit this attempted first degree murder.

We agree that the evidence in the light most favorable to the State established that Sutton drove the car to Hood's residence and was present in the car when the shots were fired. This proof, however,

fails to establish that Sutton knew that Nicely intended to murder Hood, a requisite element of the crime of facilitation. It is fundamental that the State is required to prove beyond a reasonable doubt each of the elements of the crime charged. Tenn. Code Ann. § 39-11-201(a) (2003). A conviction may not rest solely upon conjecture, guess, speculation, or a mere possibility. *State v. Tharpe*, 726 S.W.2d 896, 900 (Tenn. 1987). The mere fact that Sutton was in the company of Nicely and present at the crime scene does not of itself furnish evidence of wrongdoing. There is no proof in the record that Sutton was present or in a position to overhear the conversation between Nicely and Breeden wherein Nicely agreed to murder Hood. Indeed, the trial court's grant of Sutton's motion for judgment of acquittal with regard to the conspiracy charge was based upon the fact that Sutton played no role in the plot to kill Hood. Moreover, the record is void of any proof prior to the shooting that Nicely communicated to Sutton his intent to murder Hood. Thus, viewing the evidence in the light most favorable to the State, the evidence is legally insufficient to support the conviction.[1]

II. Breeden and Nicely

Several issues have been raised by both Breeden and Nicely. For brevity, we elect, where possible, to address such issues together.

a. Thirteenth Juror Rule

As their first issue, Breeden and Nicely have asserted that the trial court erred by abdicating its role as the thirteenth juror as required by Tenn. R. Crim. P. 33(f).[2] Breeden and Nicely argue, based upon comments by the trial judge at the motion for new trial hearing, that the court failed to fulfill or misunderstood its obligation under the law.

The trial court's comments are as follows:

> Looking at the sufficiency of the evidence, I think, if I'm not mistaken, someone talked about 13th juror and I've thought about that for some time. It's just simply not the law in this State, the Judge is not 13th juror. I'm to weigh - - I'm to

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[1] In a related issue, Sutton argues on appeal that the trial court erred by failing to submit to the jury the offense of accessory after the fact. *See* Tenn. Code Ann. § 39-11-411 (2003). Although this issue is now moot, we would agree that the proof at trial would have supported a conviction for accessory after the fact based upon Sutton's acts following the crime. Nonetheless, the trial court properly refused to charge this offense as it is not a lesser offense of the indicted crime. *Burns v. State*, 6 S.W.3d 453, 466-67 (Tenn. 1999); *see State v. Joel M. Puentes*, No. M2001-01115-CCA-R3-CD (Tenn. Crim. App. at Nashville, Feb. 1, 2002); *State v. Jon Robert Goodale*, No. M2000-02140-CCA-R3-CD (Tenn. Crim. App. at Nashville, Sept. 14, 2001).

[2] This Rule provides:

> The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence. If the trial court grants a new trial because the verdict is contrary to the weight of the evidence, upon request of either party the new trial shall be conducted by a different judge.

> weigh the sufficiency of the evidence and not step in and play the extra juror and take the case basically. So looking at the sufficiency of the evidence, this trial took some days to develop. This jury was attentive. They were in my opinion lawfully prepared. They argued their cases vociferously and I think it was - - it was properly presented to the jury for their consideration.
>
> Like I said, there were problems with this trial. It did not go off as smooth as we sometimes want, but the fact that we have a problem doesn't translate directly to error, and I find that there was no error at this particular juncture and I'm going to deny all the Motions for New Trial.

The standard of review of a motion for new trial upon grounds that the verdict is contrary to the weight of the evidence is governed by a different standard than that of a motion for judgment of acquittal or a sufficiency review. In considering sufficiency, the court is required to review the evidence from a standpoint most favorable to the prosecution and to assume the truth of the evidence offered by the State. However, the authority of the court is much broader when reviewing a motion for new trial under Rule 33(f). Under this Rule, the court must weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.

In *State v. Moats*, 906 S.W.2d 431, 434-35 (Tenn. 1995), our supreme court explained the reasoning for the thirteenth juror rule:

> The purpose of the thirteenth juror rule is to be a "safeguard . . . against a miscarriage of justice by the jury." *State v. Johnson*, 692 S.W.2d 412, 415 (Tenn. 1985) (Drowota, J., dissenting). Immediately after the trial, the trial court judge is in the same position as the jury to evaluate the credibility of witnesses and assess the weight of the evidence, based upon the live trial proceedings. Indeed, this Court has recognized that "the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court." *Bolin v. State*, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966).

Tennessee Rule of Criminal Procedure 33(f) of the Rules of Criminal Procedure imposes a mandatory duty on the trial judge to serve as the thirteenth juror in every criminal case. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). "Rule 33(f) does not require the trial judge to make an explicit statement on the record. Instead, when the trial judge simply overrules a motion for new trial, an appellate court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict." *Id*. Only if the record contains statements by the trial judge indicating disagreement with the jury's verdict or evidencing the trial judge's refusal to act as the thirteenth juror may an appellate court reverse the trial court's judgment. *Id*. Otherwise, appellate review is limited

to sufficiency of the evidence pursuant to Rule 13(e) of the Rules of Appellate Procedure. *State v. Burlison*, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993). If the reviewing court finds that the trial judge has failed to fulfill his or her role as thirteenth juror, the reviewing court must grant a new trial. *Moats*, 906 S.W.2d at 435.

In the instant case, even though the trial court made no comments indicating its dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, we may not presume from the record before us that the trial court acted as the thirteenth juror because the comments made by the court demonstrate that the court misunderstood its authority and duty as the thirteenth juror. *Cf. State v. Thomas*, 158 S.W.3d 361 (Tenn. 2005). From the court's pronouncements, we must conclude that the trial court was under the impression that the court was not to serve as the thirteenth juror at all, that not being the law of the State of Tennessee, but rather to defer to the verdict of the jury without weighing the evidence. The State argues that other comments made by the court indicate that the court did in fact weigh the sufficiency of the evidence. While it does appear that the trial court did consider the *sufficiency of the evidence*, or the legal sufficiency, that is not the proper consideration. Nor does consideration of the legal sufficiency relieve the trial court of the responsibility of examining the *weight* of the evidence in its role as thirteenth juror. *See Moats*, 906 S.W.2d at 435. Since the trial judge is in the best position to view the evidence and observe the witnesses at trial, the trial judge is free to decide, in the judge's role as thirteenth juror, that the weight of the evidence does not support the verdict. Because we conclude that the trial court failed to act as thirteenth juror, a new trial is the only practical and effective remedy to insure that the protection of the thirteenth juror rule is preserved. *Id*. Notwithstanding our holding that a new trial is necessitated for the Appellants Breeden and Nicely for the charge of conspiracy to commit first degree murder, we review, for instructional purposes, the remaining issues raised on appeal.

b. Motion to Sever

Breeden and Nicely challenge the trial court's denial of their respective motions to sever. Breeden sought severance of her conspiracy charge from her co-defendants and severance of her case from the attempted murder charge upon grounds that various statements made by prosecution witnesses at trial violated *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968). Nicely also argues that the trial court erred by not severing "the offenses and defendants." He contends that joinder of the two counts of the indictment was error because it permitted the jury to adjudicate his guilt or innocence of two inchoate offenses at a single trial in violation of Tennessee Code Annotated section 39-12-106(a).

Our rules of criminal procedure provide that separate offenses may be permissively joined in the same indictment if the offenses were part of a common scheme or plan or if they were of the same or similar character. Tenn. R. Crim. P. 8(b). There are three categories of common scheme or plan evidence: (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger continuing plan or conspiracy; and (3) offenses which are part of the same criminal conduct or arise from a single criminal episode. *State*

v. Moore, 6 S.W.3d 235, 240 (Tenn. 1999). In this case the proof clearly established that the two indicted offenses were part of a larger and continuing plan to murder the victim. Thus, joinder of the offenses in the indictment was proper. Moreover, two or more defendants may be joined in the same indictment "if each of the defendants is charged with conspiracy, and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy. . . ." Tenn. R. Crim. P. 8(c)(2). In this case, because Breeden, Nicely, and Sutton were each initially charged with conspiracy, joinder of each in count one of the indictment was proper. Additionally, joinder of the Appellants Nicely and Sutton was proper under count two, which charged criminal attempt to commit first degree murder, because each was charged with accountability for the offense. Tenn. R. Crim. P. 8(c)(1).

While the remedy for misjoinder under Rule 8(b) and prejudicial joinder under Rule 14 is the same –severance and separate trials– the two rules "operate according to different standards." *Spicer v. State*, 12 S.W.3d 438, 444 (Tenn. 2000). A motion for severance based on misjoinder under Rule 8 alleges an error in the indictment, and severance must be granted if the defendants were improperly joined. Rule 14 comes into play only if joinder was initially proper under Rule 8 but a joint trial would prejudice one or more defendants. A defendant has a right to a severance of offenses in all cases but one; the Rules allow a trial court to consolidate offenses over the defendant's objection only when the offenses are parts of a common scheme or plan and evidence of each offense is admissible in the trial of the others. *Id*. at 445.

We review decisions concerning permissive joinder and severance of offenses pursuant to Rules of Criminal Procedure 8(b), 8(c), 14(b), and 14(c) under an abuse of discretion standard. *Spicer*, 12 S.W.3d at 442 (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). A trial court's decision to consolidate or sever offenses will not be reversed unless the "'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *Id*. at 442-43 (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)).

1. Breeden

A. *Bruton* Violation

Breeden argues that the trial court's denial of her motion to sever based upon *Bruton* violations constitutes reversible error. She correctly points out that "Tennessee Rules of Criminal Procedure 14(c)(1) addresses severance in regards to a *Bruton* issue." In support of this argument, Breeden contends that various out-of-court statements purportedly made by Nicely, and testified to

at trial by Chandler, Reavis, and Tapp,[3] were extremely incriminating to her, and because Nicely did not testify,[4] the statements violated *Bruton*.

In *Bruton*, the Supreme Court held that in a joint trial the admission of a co-defendant's confession or statement implicating the defendant, which would be inadmissible against the defendant if tried alone, creates a "substantial risk" that the jury will consider the confession in determining the defendant's guilt. *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622; *see also Smart v. State*, 544 S.W.2d 109, 112 (Tenn. 1976). As asserted by the Appellant, the Sixth Circuit Court of Appeals has extended *Bruton* "slightly, holding that the prohibition applies not only to a non-testifying codefendant's *confessions*, but also to *statements* made by the codefendant that implicate the defendant." *Pettyjohn v. Newberry*, 2000 U.S. App. LEXIS 17532 (6th Cir. 2000) (citing *United States v. Bartle*, 835 F.2d 646, 651 (6th Cir. 1987)). The *Bruton* remedial provisions of Tenn. R. Crim. P. 14(c) accommodate the expanded reading of *Bruton*.

Our review of the challenged statements, which the Appellant asserts require severance based on *Bruton* violations, demonstrates that a severance is not required as the statements do not implicate *Bruton*. "The admission of a co-defendant's statement which is not inculpatory of the complaining defendant does not raise *Bruton* concerns," because "*Bruton* addresses confrontation concerns of a non-testifying co-defendant." *State v. Faulkner*, No. E2000-00309-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Apr. 17, 2001); *see also Richardson v. Marsh*, 481 U.S. 200, 208-11, 107 S. Ct. 1702, 1707-09 (1987) (declining to apply *Bruton* to an accomplice's confession when it did not incriminate the defendant).

B. *Crawford v. Washington* Violation

Within the severance issue, Breeden argues that the challenged out-of-court statements made by Nicely, as introduced by the witnesses Chandler, Reavis, and Tapp, violate her right of confrontation as proscribed by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). In *Crawford*, the United States Supreme Court held that the Confrontation Clause bars the admission of testimonial hearsay unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. *Id*. at 68, 124 S. Ct. at 1374. We would acknowledge that this holding abrogated, in part, the prior rule that the admission of hearsay did not violate the Confrontation Clause if the declarant was unavailable and the statement fell under a "firmly rooted hearsay exception" or otherwise bore particularized guarantees of trustworthiness as provided by *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980).

However, *Crawford* drew a distinction between testimonial and nontestimonial hearsay, concluding that the Confrontation Clause protects only testimonial statements. *Crawford*, 541 U.S.

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[3] At trial Tapp testified that Nicely admitted to "shooting a man" and that he saw Nicely with money which Nicely claimed was earned from the shooting. Chandler and Reavis testified that Nicely admitted to "shooting a man" upon his return to the bar and that Nicely attempted to sell Breeden's Chevrolet Blazer after the shooting.

[4] The record reflects that none of the three defendants testified at trial.

at 68, 124 S. Ct. at 1374. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law - - as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id*. Thus, unless a declarant's statements qualify as testimonial, *Crawford* is inapplicable and *Roberts* continues to apply. *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004). Construing *Crawford*, reviewing courts have concluded that a co-conspirator's statement is non-testimonial in nature. *Id*.; *see also U.S. v. Reyes*, 362 F.3d 536, 541 n.4 (8th Cir. 2004) (citing *Crawford*, 541 U. S. At 68, 124 S. Ct. at 1374) (holding co-conspirator statements are nontestimonial); *Shelton v. Georgia*, 611 S.E.2d 11, 14 (Ga. 2005); *Bush v. Mississippi*, 895 So.2d 836, 846 (Miss. 2005); (holding that co-conspirator statements are unaffected by the holding in *Crawford* as they are nontestimonial in nature); *Illinois v. Redeaux*, 823 N.E.2d 268, 272 (Ill. App. Ct. 2005) (holding that tape-recorded conversations between undercover agent and co-conspirator regarding purchase of cocaine which referred to defendant were not testimonial); *Wiggins v. Texas*, 152 S.W.3d 656, 660 (Tex. Ct. App. 2004) (holding that because co-conspirator statements are not testimonial, the Confrontation Clause does not give a defendant the right to cross-examine a person who does not testify at trial and whose statements are introduced under the co-conspirator hearsay exclusion). Thus, because co-conspirators statements are nontestimonial in nature and fall within a firmly rooted hearsay exception, *Crawford* is inapplicable, and this issue is without merit.

2. Nicely

With regard to Nicely's motion for severance, he asserts that it was error to allow the jury to adjudicate his guilt or innocence for both the charged inchoate offenses of conspiracy to commit first degree murder and attempted first degree murder in light of Tennessee Code Annotated section 39-12-106(a). This statute provides:

> A person may not be convicted of more than one (1) of the offenses of criminal attempt, solicitation or conspiracy for conduct designed to commit or to culminate in the commission of the same offense.

Tenn. Code Ann. § 39-12-106(a).

The crimes of criminal attempt, solicitation, and conspiracy have in common the fact that they deal with conduct that is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so, or has not yet achieved its culmination because there is something that the actor or another still must do. The offenses are inchoate in this sense. MODEL PENAL CODE § 5 introduction (Official Draft and Revised Comments 1985). Our criminal code provides, and logic dictates, that a person may not be convicted of more than one inchoate offense for conduct designed to culminate in the commission of the same crime.

Recognizing that the Appellant Nicely could not be convicted of both offenses, the trial court instructed the jury that if they found him guilty of conspiracy, they were not to consider the attempted murder charge. However, the jury disregarded this instruction and found Nicely guilty of

both crimes. The trial court subsequently set aside the attempted murder conviction and entered a verdict of not guilty. Nonetheless, the Appellant still complains he is entitled to a new trial because he was actually convicted of both.

After review, we find no error in the trial court's refusal to grant the motion to sever the two offenses. We agree that caselaw supports Nicely's argument that he cannot be convicted of both offenses. *See Jorge Ariel Sanjines v. State,* No. 03C01-9706-CR-00229 (Tenn. Crim. App. at Knoxville, Feb. 2, 1999). However, we do not interpret this to mean that he could not be indicted and tried for both inchoate crimes. *See State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997). Instructing the jury that Nicely could only be found guilty of one of the offenses was proper. Although the jury failed to follow the instruction, the trial court took immediate curative action and set aside the second verdict. Hence, we cannot conclude that the trial court abused its discretion in denying the motion to sever. We would further note that upon retrial, this issue is moot as Nicely cannot be retried for attempted first degree murder as a verdict of not guilty was entered by the trial court.

3. Conclusion

In sum, with regard to Breeden's and Nicely's motions to sever, we conclude that there was neither misjoinder of the offenses or defendants under Rules 8(b) and (c) because the offenses were part of a common scheme or plan and the evidence of each was admissible in the trial of the other. Moreover, we conclude that no severance was required under Tenn. R. Crim. P. 14 as no *Bruton* violation occurred, and severance was not necessary "to promote a fair determination of the guilt or innocence of one or more defendants." Finding that no prejudice has been shown, this issue is without merit. Additionally, we conclude that the Supreme Court's holding in *Crawford* has no application to this case.

c. Lack of Jury Instruction Regarding the Overt Act

Appellants Breeden and Nicely assert that the trial court erred in refusing to instruct the jury as to the overt act relied upon by the State to prove the conspiracy charge. Breeden requested that an additional instruction be given explaining that the jury must agree to what comprised the overt act, *i.e.*, the shooting of Hood. The trial court refused the instruction. The Appellants now assert that the trial court's failure to so instruct created a great risk that the convictions were not properly based in the law.

There is no dispute that a defendant has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions. *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990); *see also State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000). In evaluating claims of error in the jury charge, this court must review the charge in its entirety and read it as a whole. *State v. Leach*, 148 S.W.3d 42, 58 (Tenn. 2004). A charge shall be considered prejudicially erroneous if it fails to submit the legal issues fairly or if it misleads the jury as to the applicable law. *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997).

Relying upon *Williams v. State*, 403 S.W.2d 319, 323 (Tenn. 1966), the Appellants assert that the law is clear that it is proper to provide the jury with instructions as to the specific act comprising the overt act for the purpose of the conspiracy statute. In that case, the court held that it was not error for the trial court to provide the jury with an instruction which specifically defined the overt act. We find the Appellants' reliance upon this case misplaced.

The indictment in this case charged the three co-defendants with conspiracy to commit first degree murder, specifically alleging that "Billy Nicely and Marsha Sutton did act and attempt to kill and murder the said Michael Hood. . . ." From the record before us, we glean that there is no dispute that the firing of the weapon at Hood was the alleged overt act in this case. Thus, it was clear from both the indictment and the proof presented the nature of the overt act which the State relied upon to establish the conspiracy. This contrasts with *Williams* where the co-defendants were indicted for conspiracy to employ an instrument with the intent to procure criminal miscarriage. *Id*. Accordingly, while *Williams* establishes that in certain instances it is not error to give a special instruction of this type, the case does not stand for the proposition that such an instruction must be given in every case.

In the case before us, it appears that the jury was properly instructed with regard to the charge of conspiracy, including all the necessary elements required to establish the offense. We conclude that the trial court did not err in its refusal to charge the requested instruction in this case, as the instruction was not shown to be "fundamental" to the case. *See State v. Phipps*, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994).

d. Sufficiency of the Evidence

The Appellants both argue that the evidence supporting their conviction for conspiracy to commit first degree is insufficient. We review the issue under the standard of *Jackson v. Virginia,* 443 U.S. at 319, 99 S. Ct. at 2789, to determine if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See also* Tenn. R. App. P. 13(e).

"The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense." Tenn. Code Ann. § 39-12-103(a) (2003). The offense of conspiracy is aimed at group criminality and is based upon the principle that group criminal activity poses a greater public threat than criminal offenses committed by a single individual. *Id*. at Sentencing Commission Comments. While the essence of the offense of conspiracy is an agreement to accomplish a criminal or unlawful act, *Owens v. State*, 84 Tenn. 1, 3 (1885); *State v. Hodgkinson*, 778 S.W.2d 54, 58 (Tenn. Crim. App. 1989), the agreement need not be formal or expressed, and it may be proven by circumstantial evidence. *State v. Shropshire*, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993); *Hodgkinson*, 778 S.W.2d at 58. "The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the

execution of the criminal enterprise. Conspiracy implies concert of design and not participation in every detail of execution." *Randolph v. State*, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978). No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proven to have been committed by at least one member of the alleged conspiracy. Tenn. Code Ann. § 39-12-103(d). As relevant in this case, first degree murder is a "premeditated and intentional killing of another." Tenn. Code Ann. § 39-12-201(a)(1). Thus, in order for these convictions to be supported, the State was required to prove that Breeden and Nicely entered into an agreement to commit the offense of premeditated murder.

Breeden and Nicely each argue that the evidence is insufficient because the only evidence supporting their convictions is the conflicting testimony of Reavis and Chandler. Both Reavis and Chandler were key witnesses in the State's prosecution of the conspiracy charge. The record reflects that their testimony was in material conflict on several points. For instance, whereas Chandler testified that the conspiracy began and the money exchanged hands inside the bar, Reavis testified that the events occurred outside in the parking lot. Additionally, Chandler testified that Nicely's SKS rifle was already in Sutton's car, while Reavis testified that Nicely went inside the bar and got the gun. Their testimony also conflicted with regard to the location of the Appellants during the discussion of Hood's planned murder.

Essentially, the Appellants' argument is a challenge to the weight and credibility of the testimony of Chandler and Reavis based upon the inconsistencies present in their testimony. However, all questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *Pappas*, 754 S.W.2d at 623. The jury viewed the witnesses, heard their testimony, and observed their demeanor on the stand. While we acknowledge conflicts in the witnesses' testimony on several material points, it was the jury's prerogative to weigh the credibility of the witnesses and to resolve any conflicts in their testimony. This court will not reweigh or reevaluate the evidence presented. *Cabbage*, 571 S.W.2d at 835.

Additionally, the Appellants argue that the time line presented by the State was demonstrably impossible. They argue that based upon the testimony of the State's own witnesses, there was simply not enough time for Breeden to leave her home, drive to the Whipping Post Bar, hatch the conspiracy, as well as for Nicely to drive back to Megan Lane, shoot Hood, and return to the bar. They assert that Detective Rouse admitted, based upon his calculations, these events would have taken anywhere from fifty-four to eighty-two minutes, longer than the fifty-two minute window provided for in the indictment. Again, we find that the argument is one which was resolved by the jury.

Finally, Nicely argues that the evidence is insufficient because it fails to establish that Michael Hood was shot with premeditation or that he agreed to kill Hood. He asserts the evidence establishes that the view from where the shot was fired to where Hood was standing at the sink was obscured. Thus, he argues that the shot which was fired had to be fired blindly into the house. We disagree. After review, we conclude that the evidence is sufficient for a rational trier of fact to have found the elements of the crime beyond a reasonable doubt.

The proof at trial established that hostilities existed between the Hood and Kennedy households. After Kennedy was arrested, Breeden drove to the Whipping Post Bar and was heard exclaiming that she "wanted the motherfucker shot." Nicely replied, "It shall be done." Both Reavis and Chandler testified that Breeden gave Nicely money to complete the act. Witnesses saw Nicely leave the bar with an assault rifle in the car and return to the bar within the hour. This proof would clearly permit a rational juror to conclude that Breeden and Nicely formed an agreement to murder Hood, that Nicely agreed that he would commit the act, and that Nicely did in fact commit an overt act, the shooting, in furtherance of the conspiracy. Accordingly, we conclude that the evidence is sufficient to support Breeden and Nicely's convictions of conspiracy to commit first degree murder.

III. Breeden

a. Deviation from the Bill of Particulars/ Use of Co-conspirator's Statements

Next, Breeden argues that the introduction of various statements through the witnesses, Chandler, Reavis, and Tapp, was hearsay and as such "was clear error because it occurred outside the scope of the conspiracy." She further asserts " [a]s a result, this testimony failed to meet the criteria for any hearsay exception, including the so-called co-conspirator exception contained in Tennessee Rule of Evidence 803(1.2)." The Appellant's brief reflects that this issue is raised within the context of her argument that the State was allowed to deviate from the bill of particulars provided to the defense prior to trial. The facts as developed on this issue provide that in response to Breeden's request for a bill of particulars, specifically requesting the exact time of the conspiracy's duration, the State responded that the conspiracy began at 9:48 p.m. and ended at 10:47 p.m. on September 7th. Breeden now complains that the court erred by allowing the State to introduce hearsay statements, made by co-defendants, which occurred after the time given in the bill of particulars.

Specifically, Breeden challenges the following statements upon grounds that they were not made in furtherance of the conspiracy.[5]

Chandler testified at trial:

> Upon his return to the bar, Billy Nicely admitted that he "shot a man."
> Billy Nicely attempted to sell Breeden's Blazer following the shooting.
> When Nicely returned to the bar, he stated that "the motherfucker's dead," that he had "heard them screaming," and that 'he like it, it was a rush."

Reavis testified at trial:

> Upon Billy Nicely's return to the bar, Nicely admitted that he shot a man.
> Billy Nicely attempted to sell Breeden's Blazer after the shooting.

[5] In large part, these are the same statements that were challenged upon *Bruton* grounds.

Tapp testified at trial:

> Billy Nicely admitted shooting “a man.”
> Billy Nicely showed him money earned from the shooting.

Pursuant to Rule 803(1.2)(E), Tennessee Rules of Evidence, a statement that is hearsay is allowed against a party when made "by a co-conspirator of a party during the course of and in furtherance of the conspiracy." *See also State v. Berry*, 141 S.W.3d 549, 585 (Tenn. 2004). Declarations of a co-conspirator that would otherwise be inadmissible may be offered as proof when the following conditions are met: (1) there is evidence of the existence of the conspiracy and the connection of the declarant and the defendant to it; (2) the declaration was made during the pendency of the conspiracy; and (3) the declaration was made in furtherance of the conspiracy. *Id*.; *State v. Gaylor*, 862 S.W.2d 546, 553 (Tenn. Crim. App. 1992). To be admissible under the co-conspirator hearsay exception, a statement must be made "during the course of" a conspiracy. This means that the conspiracy must have been occurring or ongoing at the time the statement was made. *State v. Walker*, 910 S.W.2d 381, 385 (Tenn. 1995); *Gaylor*, 862 S.W.2d at 554; Neil Cohen et al., Tennessee Law of Evidence § 803(1.2)(6) (3d ed. 1995). If the conspiracy had not begun or had already concluded when the statement was made, the statement will not be admissible under the co-conspirator exception. *Id*. The exception also requires that the statement be "in furtherance of" the conspiracy. In short, the statement must be one that will advance or aid the conspiracy in some way. *See State v. Heflin*, 15 S.W.3d 519, 523 (Tenn. Crim. App. 1999). This has long been the law in Tennessee. *See Owens*, 84 Tenn. at 4; *Harrison v. Wisdom*, 54 Tenn. 99, 107-08 (1872).

“A statement may be in furtherance of the conspiracy in countless ways. Examples include statements designed to get the scheme started, develop plans, arrange for things to be done to accomplish the goal, update other conspirators on the progress, deal with arising problems, and provide information relevant to the project.” *State v. Carruthers*, 35 S.W.3d 516, 556 (Tenn. 2000) (citation omitted). Casual conversation between or among co-conspirators is not considered to be in furtherance of the conspiracy. *State v. Hutchison*, 898 S.W.2d 161, 170 (Tenn. 1994). In addition, where “a conspirator is apprehended and tells all to the police, it is unlikely the confession is admissible as a conspirator statement.” *Walker*, 910 S.W.2d at 386. Under those circumstances, the statement "becomes only a narrative statement of past conduct between conspirators." *Id*. Similarly, gossip or bragging about a crime may not be considered in furtherance of the conspiracy. Neil Cohen et al., Tennessee Law of Evidence § 803(1.2)(6).

It is often difficult to determine whether a conspiracy was over on a particular date, as conspiracies often continue until the ultimate goal is achieved. Neil Cohen et al., Tennessee Law of Evidence § 803(1.2)(6). Our criminal conspiracy statute provides that:

> Conspiracy is a continuing course of conduct which terminates when the objectives of the conspiracy are completed or the agreement that they be completed is abandoned by the person and by those with whom the person conspired. The objectives of the conspiracy include, but are not limited to, escape from the crime,

> distribution of the proceeds of the crime, and measures, other than silence, for concealing the crime or obstructing justice in relation to it.

Tenn. Code Ann. § 39-12-103(e)(1).

We conclude that the out-of-court statements of the conspirator Nicely admitted at the trial of the co-conspirators[6] were improperly introduced as they were not made in furtherance of the conspiracy. Nicely's declarations upon his return to the bar that he had "shot a man" and he "liked it," may clearly be characterized as bragging about his exploits. The statement in no way aided in the achievement of the primary objective of the conspiracy. Indeed, at the time Nicely made each statement, the conspiracy had already terminated by virtue of the fact that the crime which was the object of the agreement had been committed, *i.e.*, the shooting of Hood. Moreover, we conclude that Nicely's acts and declarations regarding the sale of the Blazer or money earned from the shooting also were not made in furtherance of the conspiracy. Accordingly, none of the challenged statements are admissible upon the retrial of Breeden.

b. Limiting Instruction with Regard to Co-conspirator's Statements

Next, Breeden asserts that the trial court committed reversible error by failing to provide an adequate limiting instruction to the jury with regard to the statements of a co-conspirator. During the course of the trial proceedings, the trial court intervened and provided the following instruction, in pertinent part, to the jury on this issue:

> Ladies and gentlemen, this is something that I am going to try to clear up for you a little better as we move along. But these particular types of crimes that are on this indictment, one is a conspiracy and one is an attempt. There are some very, for lack of a better word, some very fine lines that this Court may allow evidence in on some particular indicted offenses and not - - and keep out the same evidence on some other type of charge. I'm going to give you an instruction at the end of the trial that you can rely on as the law in this case[7] but I'm going to tell you now that statements made by co-defendants in furtherance of a conspiracy can be used one against the other- For instance, if there are five defendants in a conspiracy, the statements that two of those defendants, two of those conspirators say to one another during the furtherance of that conspiracy, the planning, the carrying out of the particular offense, they can be used against one another.
>
> On the other hand, for instance in this case, in a similar situation if we had five defendants that were charged with attempted first degree murder, statements made

[6] We find it unnecessary to review the challenged statement made by Marsha Sutton to Tapp in which she purportedly asked Tapp to falsely provide an alibi because Sutton was acquitted of conspiracy. Thus, any challenge to her statement is moot as she was found not to be a co-conspirator.

[7] No further instruction was provided to the jury by the trial court.

between co-defendants - - I mean, let me back up here a second. I've left out a very critical part.

When a co-conspirator - - let me start over. Forget that for the record. Forget everything I've just said. Let me try to get this - - and I need to prepare this a little better and I will more formally but I need to do it now.

Statements made between - if a co-conspirator makes a statement in furtherance of a conspiracy that implicates another conspirator, another person, that can be used against that other person if it is in furtherance of the conspiracy.

On the other hand, if you have multiple defendants and the charge is attempted murder, or attempted anything, or anything besides a conspiracy, one of those defendants' statements cannot be used against another if it incriminates them.

The Appellant argues that the limiting instruction, as given, "was far short of sufficient" but fails to identify the nature of the insufficiency. We agree with Breeden that she was entitled to "a correct and complete charge of the law." *Teel*, 793 S.W.2d at 249. However, we know of no rule in this state which requires that an explicit limiting instruction be given if acts or statements by any co-conspirators made in the course of and in furtherance of the conspiracy have been properly admitted.[8]

Although, we agree that the limiting instruction, as given, could have been more succinct, the instruction properly informed the jury that a statement of a conspirator could be used against a co-conspirator if the statement was made in furtherance of the conspiracy. The trial court also instructed the jury that the co-conspirator's hearsay exception rule does not apply in any criminal case other than in a conspiracy prosecution. We find this to be a correct statement of the law.

IV. Nicely

Prosecutorial Misconduct

Nicely asserts that the State committed prosecutorial misconduct when it was permitted "to take a position contrary to its discovery response to the defense regarding the credibility of one of

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[8]We would note for illustrative purposes the following example of a limiting instruction utilized by the 8th Circuit Court of Appeals:

> You may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to the defendant even though they were done or made in the absence of and without the knowledge of the defendant.

PATTERN CRIM. JURY INSTR. 8TH Cir. § 5.06I (2003).

the key witnesses to the State's prosecution." In response to the discovery request of whether any witness had been offered leniency or favor in exchange for testimony, the State responded that "Reavis was released early on a VOP [violation of probation] for her statement." During direct examination of Deputy Tripp, the officer who took Reavis' statement, the State elicited testimony from Tripp that Reavis was not in custody when her statement was obtained and that she gave the statement of her own free will. The Appellants immediately lodged objections, and a jury-out hearing was held to determine the propriety of the State's position, which was in contrast to their discovery response. The State conceded, during the hearing, Reavis was provided leniency by being released early on the violation of probation warrant in exchange for her testimony. Following this "stipulation," as it is referred to, the trial court instructed the jury as follows: "Contrary to what you have heard from [Deputy Tripp] Charley Reavis was released from custody and a violation of probation warrant was dismissed in exchange for her statement."

During Reavis' testimony shortly thereafter, she stated that on the day she gave her statement to the deputy, she was allowed to plead guilty to an assault charge which had resulted in her incarceration. Reavis also stated that the violation of probation warrant, which was dismissed on the same day, stemmed from her assault charge. Notwithstanding the State's "stipulation" and concession in its discovery response, the prosecutor, during direct examination was permitted to ask Reavis, "Do you personally feel that you were promised anything in exchange for your testimony." Reavis responded, "no."

The general test to be applied in determining whether argument or conduct of counsel is improper is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." *Harrington v. State*, 385 S.W.2d 758, 759 (1965). The Appellant bears the burden of clearly establishing that the improper conduct affected the verdict to his prejudice. *Berry*, 141 S.W.3d at 586 (citing *Harrington*, 385 S.W.2d at 759). In the absence of a threshold instance of misconduct, we have no occasion to consider the factors enumerated in *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), or to assess the effect on the verdict. *See Coker v. State*, 911 S.W.2d 357, 369 (Tenn. Crim. App. 1995) (prosecutor's actions which we deemed to be proper were discarded and the *Judge* factors were not applied).

While we do not condone the prosecution's contradiction of its' own position, we are unable to conclude that, under the standard of *Harrington*, the State's action in this case crosses the threshold of misconduct. The total circumstances under which Reavis' statement was made and the leniency given in exchange were clearly presented to the jury through a comprehensive examination of Reavis and guidance from the court's instruction regarding the witness credibility. The State argues that it in no way was attempting to undermine or contradict its position that Reavis had given her statement in exchange for her release by simply asking how she "personally fe[l]t" about the situation. The issue of misconduct, however, is governed not by what Reavis felt personally but rather by the State's repudiation of its own agreement. Nonetheless, for the above reasons, we conclude that the conduct did not result in prejudice to Nicely.

CONCLUSION

Based upon the foregoing, Appellant Sutton's conviction for facilitation of first degree murder is reversed and dismissed as the evidence is legally insufficient. With regard to Appellants Breeden and Nicely, the case is reversed and remanded for a new trial on the charge of conspiracy to commit first degree murder as the trial court failed to perform its duty as the thirteenth juror in the case.

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DAVID G. HAYES, JUDGE